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No. 82-1740

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

CHER,

Petitioner,

—vs.—

NEWS GROUP PUBLICATIONS, INC., a Delaware corporation doing business as THE STAR,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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PRELIMINARY STATEMENT

This brief is submitted on behalf of respondent News Group Publications, Inc.,[1] in opposition to the petition by Cher for a writ of certiorari to the United States Court of Appeals for the

1 Pursuant to Rule 28.1 of the Rules of this Court, respondent has one subsidiary corporation entitled New York Magazine Company, Inc., is a wholly-owned subsidiary of News America Publishing Incorporated, and has the following domestic affiliates: The Express—News Corp., News Group Productions, Inc., Houston Community Newspapers, Inc., World Printing Co., Inc., World Publishing Services, Inc., Leisure Systems, Inc., San Antonio Film Features, Inc., News Group Boston, Inc., and News Air, Inc.

Ninth Circuit. The petition asks this Court to engraft trademark and unfair competition principles upon undisputed editorial practices, historically governed by First Amendment protections. The adoption of this theory would seriously undermine this Court's long-standing interpretations of the First Amendment and impair the uninhibited, robust, and wide-open debate on public issues that is the hallmark of American democracy.

ARGUMENT

I

AS EDITORIAL MATTER, MAGAZINE HEADLINES COMMAND FIRST AMENDMENT PROTECTION

The court below in a well-reasoned opinion rejected petitioner's claim that her right of publicity had been violated. As a result the sole question now presented is whether Section 43(a) of the Lanham Act (15 U.S.C. § 1125[a]) regulates the wording of headlines related to articles published in magazines. No fair reading of the statute justifies such contention. But assuming, *arguendo,* that it did, this Court should not permit such an incursion into the historic protection of the First Amendment for dissemination of information of general interest to the reading public.

The Court has long resisted attempts by statute or judicial fiat to cut back First Amendment protections. *See, e.g., Miami Herald Publishing Co.* v. *Tornillo,* 418 U.S. 241 (1974) (a state statute requiring a newspaper to publish a reply to an editorial, was unconstitutional); *Nebraska Press Association* v. *Stuart,* 427 U.S. 539 (1976) (a court order barring the publication or broadcast of confessions or admissions made by a criminal defendant, was unconstitutional); *New York Times Co.* v. *United States,* 403 U.S. 713 (1971) (a court order prohibiting a newspaper from publishing information contained in a governmental study concerning the Vietnam war, was unconstitutional); *Globe Newspaper Co.* v. *Superior Court,* ____ U.S.

____, 102 S. Ct. 2613 (1982) (a state statute mandating exclusion of the press and the public from the courtroom during trial testimony of minor victims of certain sexual offenses, was unconstitutional as a violation of the First Amendment).

The First Amendment protects magazines and newspapers against statutes which limit other businesses. In striking down a state statute which permitted newspapers to be enjoined as a nuisance, this Court stated that:

> "The administration of government has become more complex, the opportunities for malfeasance and corruption have multiplied, crime has grown to most serious proportions, and the danger of its protection by unfaithful officials and of the impairment of the fundamental security of life and property by criminal alliances and official neglect, emphasizes the primary need of a vigilant and courageous press, especially in great cities."

Near v. *Minnesota,* 283 U.S. 697, 719-20 (1931). The Court in that case responded to an argument similar to petitioner's by stating: "Characterizing the publication as a business, and the business as a nuisance, does not permit an invasion of the constitutional immunity against restraint." *Id.* at 720.

In 1936, the Court, while invalidating a Louisiana statute which taxed newspapers having a circulation in excess of 20,000 copies per week, stated:

> The newspapers, magazines, and other journals of the country, it is safe to say, have shed and continue to shed, more light on the public and business affairs of the nation than any other instrumentality of publicity; and since informed public opinion is the most potent of all restraints upon misgovernment, the suppression or abridgment of the publicity afforded by a free press cannot be regarded otherwise than with grave concern.
>
> * * *
>
> A free press stands as one of the great interpreters between the government and the people. To allow it to be fettered is to fetter ourselves.

Grosjean v. *American Press Co.*, 297 U.S. 233, 250 (1936). As this Court has reaffirmed only this Term, "We have long recognized that even regulations aimed at proper governmental concerns can restrict unduly the exercise of rights protected by the First Amendment." *Minneapolis Star & Tribune Company* v. *Minnesota Commissioner of Revenue*, ____ U.S. ____, 103 S.Ct. 1365, 1376 (1983).

Petitioner would have this Court separate headlines from the articles to which they relate and thus exclude them from constitutional coverage. Newspapers and magazines are protected root and branch. Photographs, captions, and headlines are all entitled to the same constitutional protection as the actual wording of the articles themselves.

II

EDITORIAL HEADLINES ARE NOT GOVERNED BY § 43(a) OF THE LANHAM ACT

Petitioner seeks to penetrate these First Amendment safeguards by characterizing the headlines accompanying the *Star's* article on Cher's life as being mere "labels", devoid of any news value, as if alerting the purchaser to the contents of the story, like the label on a jar on the store shelf. She bases this novel claim on the wording of the Lanham Act, which exposes to civil suit any person who uses "in connection with any goods or services, or any container or containers for goods, a false designation of origin, or any false description or representation. . . ." (15 U.S.C. § 1125[a]).

Petitioner has admitted throughout this case that the statements in the article were neither false nor defamatory (*see* Appendix annexed to the Petition ["App."] p.5). As the court below stated, "Cher's theory was that by using the words 'Exclusive Series' and 'Cher: My life, my husbands and my many, many men' on the cover of *Star,* the magazine was falsely representing to the public that Cher had given *Star* an

exclusive interview." (App. p.5). Cher did not argue that the headline on the cover of the *Star* and the other headlines inside the publication (Petition ["Pet."] p.4) accurately told the reader about the *content* of the article. Rather she argued that the cover headline falsely stated her relationship with the *Star* and implied that she endorsed the *Star.*

These headlines performed their normal editorial function. In sprightly fashion, they informed the reader that the March 17, 1981 issue of the *Star* contained an article about the entertainer Cher and her experiences with her husbands and other men in her life. Petitioner herself admits (even boasts) that "there is a great deal of interest by the public worldwide in the events of Cher's life." (Pet. p.2).

The role of a headline is to inform the reader of the content of the article to which it is related. In effect, a headline is a capsulized version of what is to follow. "A headline should be concise, descriptive of the text, and arresting. It should be 'a fair index of the matter contained in a truthful report'." *Paris v. New York Times Co.,* 170 Misc. 215, 9 N.Y.S. 2d 689, 692 (N.Y. Sup. Ct. 1939), *aff'd,* 259 App. Div. 1007, 21 N.Y.S. 2d 512, *motion for leave to appeal denied,* 260 App. Div. 859, 23 N.Y.S. 2d 479 (1st Dept. 1940).

The information that a headline transmits is newsworthy and of interest to the general public, and not merely a descriptive label. Headlines and their accompanying articles have been construed together in libel actions to determine whether they convey a defamatory meaning. " 'The rule is general that both the headline and the item to which it is attached are to be considered as one document in determining the effect of an article complained of as being defamatory.' " *Cole Fischer Rogow, Inc.* v. *Carl Ally, Inc.,* 29 A.D. 2d 423, 426, 288 N.Y.S. 2d 556, 561 (1st Dept. 1968), *aff'd,* 25 N.Y. 2d 943, 252 N.E. 2d 633, 305 N.Y.S. 2d 154 (1969). Headlines which are a fair index of information contained in a truthful article are not actionable. *Schermerhorn v. Rosenberg,* 73 A.D. 2d 276, 287,

426 N.Y.S. 2d 274, 283 (2d Dept. 1980); *Lawyers' Co-Operative Publishing Co. v. West Publishing Co.*, 32 App. Div. 585, 590, 52 N.Y.S. 1120, 1123 (4th Dept. 1898) ("In determining whether headlines prefixed to a report are fair, they and the matter to which they refer must be construed together.") Headlines are clearly protected by the First Amendment.

Petitioner argues that an exclusion for headlines from Lanham Act application would create a special exemption for the media. In fact, that exemption was created almost two hundred years ago when the First Amendment was adopted. A headline is purely editorial matter, entitled to the same constitutional protections as the words in the actual article. A headline is not like a name on a record jacket (*see, Benson* v. *Paul Winley Record Sales Corp.*, 452 F. Supp. 516 [S.D.N.Y. 1978]), nor like an acting credit at the end of a movie (*see, Smith* v. *Montoro*, 648 F.2d 602 [9th Cir. 1981]), nor like an author credit on a book (*see, Follett* v. *New American Library, Inc.*, 497 F. Supp. 304 [S.D.N.Y. 1980]), nor even like the trademark-title of a magazine (*see, New West Corp.* v. *NYM Company of California, Inc.*, 595 F.2d 1194 [9th Cir. 1979]).

One district court has considered a claim under similar facts based, *inter alia*, upon § 43(a) of the Lanham Act. In *Hicks* v. *Casablanca Records*, 464 F. Supp. 426 (S.D.N.Y. 1978), the heir and assignees of the property interests of noted mystery writer Agatha Christie sought to enjoin the distribution of a movie and a book which provided a fictionalized account of the disappearance of Mrs. Christie for eleven days in December, 1926. The plaintiffs alleged that "the defendants' use of the name 'Agatha' and 'Agatha Christie' would cause confusion in the minds of the public in general, and Agatha Christie readers in particular, to the effect that the movie and novel were authorized or even written by Mrs. Christie." *Id.* at 433. The court found that the plaintiffs could not prove any facts to support their claim under the Lanham Act, and it denied the motion for a preliminary injunction and dismissed the claim.

Although no other lower court apparently has addressed the issue of Lanham Act regulation of obviously editorial matter,[2] some lower courts have rejected claims for appropriation of a celebrity's right of publicity [in essence, a commercial cause of action] when the use of the person's name or likeness was in an editorial context. *E.g., Ann-Margret* v. *High Society Magazine, Inc.*, 498 F. Supp. 401, 406 (S.D.N.Y. 1980). *Accord, Hicks* v. *Casablanca Records, supra,* 464 F. Supp. at 430. Although this Court did rule in *Zacchini* v. *Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977) that the broadcast of the *entire* act of a performer at a county fair might abridge the performer's right of publicity, it did recognize the continuing First Amendment protection for a report of the performer's act. "It is evident, and there is no claim here to the contrary, that petitioner's state-law right of publicity would not serve to prevent respondent from reporting the newsworthy facts about petitioner's act." *Id.* at 574. Here, the *Star's* article and accompanying headlines were a report on the newsworthy facts of the life of the entertainer Cher. Indeed, the report was drawn from her own words.

The court below correctly stated that the First Amendment protection extends to the "use of headlines and cover display so long as the headlines and promotional devices were true or were not published with knowledge that they were false or in reckless disregard for their truth." (Pet. p.7).

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2 A review of the legislative history of the Lanham Act does not disclose *any* discussion of the applicability of that Act to editorial matters, including headlines. It is reasonable to conclude that the notion that its provisions might cover publications protected by the First Amendment was just too far-fetched to occur to any member of Congress.

III

THE *STAR*'S HEADLINES WERE NEITHER FALSE NOR MISLEADING

Petitioner urges in her petition that since this is not a false light privacy nor a libel case that this Court's "actual malice" standard as initially enunciated in *New York Times Co.* v. *Sullivan,* 376 U.S. 254 (1964) and later invoked in *Time, Inc.* v. *Hill,* 385 U.S. 374 (1967) is not applicable here. Petitioner would have this Court impose the Lanham Act's "likelihood of confusion" standard, arguably easier to meet than a showing of knowledge of falsity or reckless disregard of the truth. Even under such a standard, petitioner's position has no merit.

The headline, as the Court of Appeals aptly noted, conveyed to the reader information as to the content of the article: "*Star* was entitled to inform its readers that the issue contained an article about Cher, that the article was based on an interview with Cher herself, and that the article had not previously appeared elsewhere. It sought to do so by the use of words, including 'Exclusive Series'." (App. p.5) It is important to note that the cover headline read "Exclusive Series" and *not* "Exclusive Interview."[3] It had been stipulated that the article as it appeared in the *Star* "had not previously appeared in any other publication." (App. pp. 4-5).

The headline on the cover of the *Star* was an accurate summary of what the reader would see upon reading the article, and could never be actionable under the Lanham Act.

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3 The court below noted that the *Star* had previously published a number of "exclusive" interviews with Cher, and that she had never been paid by the *Star* for any of these interviews. (App. p. 4)

CONCLUSION

The well-reasoned opinion of the court below should not be disturbed by a theory which would impose a business regulatory statute upon purely editorial matter. Petitioner has not shown either that the Lanham Act was ever intended to apply to editorial matter or that, even if it did, the cover headline on the *Star* was false or misleading. It is respectfully requested that this Court deny the within petition for a writ of certiorari.

Dated: May 17, 1983

Respectfully submitted,

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